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May 27, 2020

Via ECF & Email

Hon. Sarah Netburn
U.S. District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Rich v. Fox News Network, LLC*, No. 18-cv-2223

Dear Judge Netburn:

Plaintiffs Joel and Mary Rich and defendants Fox News Network, LLC and Malia Zimmerman ("Fox Defendants") jointly submit this letter to update the Court on the status of discovery in the above-captioned case.

Pending Motions

1. The Fox Defendants filed a motion to dismiss the negligent supervision, vicarious liability, aiding and abetting, and conspiracy claims. That motion has been fully briefed.
2. Defendant Ed Butowsky's motion to dismiss for lack of personal jurisdiction is fully briefed and awaiting decision.

Status of Party Discovery

Plaintiffs have produced 2,110 documents to date. Fox News has produced 9,039 documents. Malia Zimmerman has produced 623 documents. All of these parties are continuing to produce documents.

Status of Discovery Disputes

1. Fox News's productions thus far have included documents redacted on the basis of New York and federal newsgathering privileges. Fox News has agreed to provide a log that

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identifies the basis for its redactions by group by June 4. Plaintiffs agree that this is reasonable and will reserve their rights to determine whether there exist disputes with regard to the newsgathering privileges until they are able to review Fox's log. Fox News is not presently withholding responsive documents related to the news reports at issue in the amended complaint based on the newsgathering privileges, but it reserves the right to do so as discovery progresses.

2. Both Plaintiffs and Fox News have served document requests on *pro se* defendant Ed Butowsky. The lawyer representing Mr. Butowsky in separate litigation involving Aaron Rich made a production to Fox News on Mr. Butowsky's behalf on March 20, 2020. Certain of the documents are the subject of a dispute as set forth in a letter filed by Plaintiffs on May 22, 2020, a response from Fox on May 26, 2020, and a reply from Plaintiffs to be filed by May 28, 2020. Fox News intends to produce the documents not subject to dispute by the end of the week.

3. Plaintiffs have contacted Mr. Butowsky and, at his request, a lawyer representing him in other matters, Ty Clevenger, regarding when Mr. Butowsky will produce certain documents. Although Mr. Butowsky and his counsel have responded to Plaintiffs' requests, Mr. Butowsky has, to date, produced no documents. At this time, Plaintiffs are not seeking intervention from the Court and will update the Court if that changes.

4. The parties disagree over which documents Fox News will produce relating to Ed Butowsky or Rod Wheeler. Plaintiffs believe that all documents related to these individuals from the designated Fox News custodians within the applicable date range are relevant within the meaning of Rule 26, and not burdensome to produce. Fox News objects to producing documents relating to their involvement in news stories not referenced in the amended complaint. Fox contends, *inter alia*, that those documents are irrelevant and producing them is disproportionate to the needs of the case and, even if they were relevant or proportional, would be privileged. Fox has provided Plaintiffs with data on the number of documents that hit on the "Wheeler" and "Butowsky" search terms, and certain information about subject matters. If the parties are unable to resolve their disagreement over whether these documents should be produced, Plaintiffs will file a letter motion regarding this dispute by June 10, 2020.

Status of Third-Party Discovery

Plaintiffs have served third-party subpoenas on their son, Aaron Rich; on Fox Television Stations, LLC; and on former Fox News employee Adam Housley. Plaintiffs produced the Fox Television and Housley documents to Fox News and Zimmerman today, May 27, 2020. Plaintiffs have stated they will produce the Aaron Rich documents to Fox and Zimmerman upon resolution of how the protective order in the Aaron Rich case applies to documents produced in this litigation. Plaintiffs also served subpoenas on Matt Couch, Verizon, AT&T, and Zoom and have not yet received responsive documents.

Fox News received a production from third party Rod Wheeler and sent that production to Plaintiffs last month. Fox News has also served a subpoena on Brad Bauman, the Rich family spokesman, who consented through an attorney to electronic service. Mr. Bauman's time for

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responding to the subpoena has not yet elapsed. Fox News has also served a subpoena on Plaintiffs' son, Aaron Rich, who has not yet produced responsive documents. Additionally, Fox News has noticed a subpoena to third party Cassandra Fairbanks, a resident of the District of Columbia. It has not succeeded in reaching Ms. Fairbanks to secure her consent to electronic service and has refrained from attempting in-person service of her, and others, due to the public health crisis. Fox News will attempt in-person service of the subpoena after the District enters the first phase of reopening from the mayor's stay-at-home order.

Finally, Fox News is attempting to serve subpoenas on both WikiLeaks and its founder, Julian Assange. As WikiLeaks claims to have no physical presence, Fox News has contacted several lawyers who have represented WikiLeaks in other matters in an effort to serve the subpoena electronically and will continue to do so. Fox News will also pursue additional means of service if necessary, including but not limited to service by certified mail or via Twitter. Fox News also plans to initiate Hague Convention procedures for requesting documents from Mr. Assange.

Third-Party Discovery Requests to Fox News in Other Litigation

Fox News and Malia Zimmerman filed a motion to quash the deposition subpoena that Aaron Rich issued to Ms. Zimmerman in his suit against Mr. Butowsky in federal court in the District of Columbia. The court denied the motion, and Fox News and Ms. Zimmerman moved for reconsideration. The reconsideration motion was fully briefed as of May 13. In the meantime, the court has stayed Aaron Rich's case through July 10 "due to the ongoing health crisis." See Minute Order, May 26, 2020, *Rich v. Butowsky*, 18-cv-681 (D.D.C.).

Fox News is also making rolling productions to National Public Radio ("NPR") in response to the document subpoena NPR issued in a case brought by Mr. Butowsky in federal court in Texas. All documents produced to NPR have also been produced to Plaintiffs.

Next Status Update

The parties propose sending another status update to the Court on June 30.

Sincerely,

/s/ Katherine Moran Meeks
Counsel for Defendant Fox News Network, LLC

With consent,

David Stern
Counsel for Defendant Malia Zimmerman

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